IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-5952

DETA MONA TRIMBLE AND
JESSIE TRIMBLE,

Appellants,

v.

JOSEPH ROOSEVELT GORDON, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF THE APPELLANTS

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OPINION BELOW

The Illinois Supreme Court issued no written opinion in this cause. A copy of its official order is contained in the Appendix at pages 54-56. The Appendix at page 53 also contains a certified transcript of the Illinois Supreme Court ruling from the bench that its decision in this cause was based upon its decision in *In re Estate of Louis Karas*, 61 Ill.2d 40 (June 2, 1975). The *Karas* decision is contained in the Appendix at pages 38-52.

JURISDICTION

The judgment of the Illinois Supreme Court, affirming the trial court's holding that Deta Mona Trimble is not the heir at law of Sherman Gordon, was entered on September 24, 1975. Notice of Appeal was filed on November 17, 1975. The Jurisdictional Statement was filed in this Court on December 22, 1975. On March 22, 1976, probable jurisdiction was noted.

The jurisdiction of the Court to hear this appeal is conferred by Title 28, United States Code, Section 1257(2).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTIONAL PROVISION:

United States Constitution, Amendment XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHALLENGED STATUTE:

Illinois Revised Statutes, Ch. 3, Sec. 12 Illegitimates (final paragraph).

> An illegitimate child is heir of his mother and of any material ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father's child is legitimate.

QUESTIONS PRESENTED

1. Does the Illinois Probate Act, which denies an illegitimate child any intestate succession rights from his father, while granting such rights to a legitimate child whose father dies intestate, violate the Equal Protection Clause of the Fourteenth Amendment by discriminating against illegitimate children?

2. Does section 12 of the Illinois Probate Act, providing that an illegitimate child whose father dies intestate is not his heir, but that an illegitimate child whose mother dies intestate is her heir, violate the Equal Protection Clause of the Fourteenth Amendment by discriminating invidiously among illegitimate children based on the sex of the decedent?

3. Does the sex-based classification in section 12 of the Illinois Probate Act, which provides that an illegitimate child is not the heir of his intestate father while providing that an illegitimate child whose mother dies intestate is her heir, violate the Equal Protection Clause of the Fourteenth Amendment by discriminating among the surviving parents of illegitimate children based on the sex of the surviving parent?

STATEMENT OF THE CASE

This case involves the question of whether the illegitimate child of a man who died intestate may be denied statutory inheritance rights available to all legitimate children. Sherman Gordon, a 28 year old resident of Chicago, died May 23, 1974, leaving no will. He was the victim of a homicide. The value of his estate is approximately $2,500. He died leaving no spouse, and appellant Deta Mona Trimble, 3 years old at the time of his death, his only descendent.

Appellant Jessie Trimble is a 30 year old woman residing in Chicago. She and Sherman Gordon lived together with their child, Deta Mona Trimble, from 1970 until his death. However, they never married. On January 2, 1973, the Circuit Court of Cook County, Illinois entered an order in the case of *Jessie Trimble v. Sherman Gordon,* 72 MC1-846169, finding said Sherman Gordon to be the father of Deta Mona Trimble, and ordering him to pay $15 per week for her support to her mother Jessie Trimble. (A. 7-10) Sherman Gordon in his day-to-day activities publicly acknowledged Deta Mona Trimble as his child, and he supported her pursuant to the said paternity order. (A. 24-26)

On July 25, 1974, Deta Mona Trimble, by her mother and next friend, Jessie Trimble, filed a Petition for Letters of Administration, Determination of Heirship and Declaratory Relief in the Circuit Court of Cook County, Illinois. (A. 3-10) On August 12, 1974, Jessie Trimble filed a Petition For Letters of Administration to Collect, and an order was entered on that date appointing her Administrator to Collect. (A. 11-12)

On August 14, 1974, the heirship hearing was held, and in addition to evidence as to the other heirs of the decedent Sherman Gordon, and the introduction into evidence of the prior paternity adjudication, the Court heard arguments as to the unconstitutionality of Illinois Revised Statutes, Ch. 3, Sec. 12, as it applies to illegitimate children. (A. 16-30) On August 15, 1974, the court denied Jessie Trimble's Petition For Letters of Administration. (A. 13)

On September 9, 1974, the court entered the Order Declaring Heirship, which provided that the only heirs of Sherman Gordon are his father, mother, brother, two sisters, and half-brother. (A. 14-15) In so doing it was held that Deta Mona Trimble was not the heir at law of Sherman Gordon. An Appeal to the Illinois Appellate Court was taken from the September 9, 1974, order. (A. 31-32) A motion for direct appeal to the Illinois Supreme Court was made. (A. 33-35) That court entered an order allowing direct appeal, thus bypassing the Illinois Appellate Court. (A. 36-7) The Illinois Supreme Court also granted leave to appellants to file an Amicus Brief in the case of *In Re Estate of Louis Karas,* which was then pending before the court. In that case, and its companion case, *In Re Estate of Robert Woods,* illegitimate children whose fathers had died intestate challenged on constitutional grounds the same statute that is challenged herein.

On June 2, 1975, the Illinois Supreme Court issued its opinion in *In Re Estate of Louis Karas,* 61 Ill.2d 40 (1975), upholding the statute and rejecting claims as to its unconstitutionality, including arguments made in the Amicus Brief. (A. 38-52) On September 24, 1975, oral argument was held in the instant case before the Illinois Supreme Court, and Chief Justice Underwood orally

delivered the opinion of the court from the bench saying the trial court judgment was affirmed, based upon the *Karas* holding. (A. 53) On October 15, 1975, the court issued its written order, effective September 24, 1975, affirming the trial court. (A. 54-56) It is from the order dated September 24, 1975, issued October 15, 1975, that this appeal is taken. On October 21, 1975, Justice Daniel P. Ward of the Illinois Supreme Court entered an order recalling and staying the mandate, pending resolution of this Appeal. (A. 57)

The Notice of Appeal to this Court was filed in the Illinois Supreme Court on November 17, 1975. (A. 58-59) The Appeal and Motion to Proceed In Forma Pauperis were docketed on December 22, 1975. On March 22, 1976, this Court granted the Motion for Leave to Proceed In Forma Pauperis, (A. 60) and noted probable jurisdiction. (A. 61)

SUMMARY OF ARGUMENT

Appellants contend that Sec. 12 of the Illinois Probate Act violates their right to Equal Protection of the Law as guaranteed by the Fourteenth Amendment to the United States Constitution. The statute declares illegitimate children to be the heirs of their mothers but not of their fathers. It renders the child's intestate succession rights dependent on the marital status of his parents at his birth. It also renders the child's succession rights dependent on the sex of the deceased parent. This legislative classification offends the Equal Protection Clause, as the deprivations visited on both the illegitimate child and his surviving mother fail to advance any valid state interest.

The Illinois Supreme Court relied exclusively on *Labine v. Vincent*, 401 U.S. 532 (1971), in upholding the constitutional validity of the statute. In doing so, it ignored the fact that both the analytic methodology and the rationales of *Labine* have been rejected by later rulings of this Court in cases concerning illegitimacy and invidious discrimination in the probate field.

The Illinois Supreme Court also ignored crucial distinctions between the Louisiana statutory scheme at issue in *Labine* and the Illinois statute at issue here. Louisiana, unlike Illinois, did not also discriminate among illegitimate children, did not completely exclude any children from receiving any benefits from the estate, and did not discriminate against women by disinheriting the children from only the father's estate.

The Illinois Supreme Court thus erred in ruling that illegitimate children can constitutionally be prohibited from inheriting from their fathers in intestacy. This Court should find that the application of *Labine* to this case is an unwarranted expansion of *Labine*, that the judgment below was in error, and that *Labine* is essentially limited to its facts, valid with respect only to the unusual Louisiana scheme at issue there. Alternatively, the *Labine* decision can be reconsidered in light of intervening decisions, and overruled.

The strict judicial scrutiny this Court has reserved for certain statutory classifications is warranted in examining this and other discriminations against illegitimate children. Recent decisions of this Court in cases concerning discrimination against illegitimate children have ascribed to such children all of the characteristics of other "suspect classes." Illegitimacy is an accident of birth; the members of the adversely affected class cannot change their status; the class constitutes a

discrete and insular minority; and the class has been historically and is currently stigmatized by society. Thus, the strict judicial scrutiny applicable to classifications based on race, alienage, and nationality should be used to examine the Probate Act's discrimination against illegitimate children. Since the discrimination serves no compelling state interest, it is invalid.

Even if this Court considers it unnecessary to reach the question of suspect class status, the statute is invidiously discriminatory. In its recent decisions concerning discrimination against illegitimate children, this Court has subjected such discrimination to rigorous review. The fact that this case concerns a probate code provision does not insulate the state action here from review under the Fourteenth Amendment, as is established by recent decisions. The standard of review, moreover, must be in accord with the standard of review applied to other classifications against illegitimate children, which requires a fair, substantial and significant relation to a permissible state purpose.

Examined under any standard of review, Section 12 of the Illinois Probate Act is constitutionally defective since the discrimination directed against illegitimate children is not rationally related to any legitimate state interest. The asserted purpose of strengthening family life, accomplished by imposing a disability on children powerless to prevent the condemned behavior, cannot logically be ascribed to the Illinois Probate Code; even if it could, this Court has repeatedly condemned as irrational statutes which purport to deter adults from engaging in non-marital relations by penalizing the innocent offspring of such relations. The state's interest in the prompt and definitive devolution of property left by decedents also is not furthered by the classification

since Sherman Gordon was judicially determined to be the father of Appellant Deta Mona Trimble. Moreover, with respect to classifications based on legitimacy, this Court has not tolerated general and over-inclusive prophylactic rules which avoid the need for individualized determinations.

That the decedent could have left a will surmounting the statutory bar to succession by his offspring cannot constitutionally justify the statute, since the means of overcoming the disability imposed are beyond the child's control. Furthermore, another unarticulated but conceivable "rationale"–that the legislature by enacting Sec. 12 acted in accordance with the "presumed intent" of the decedent–is also unavailable both because there is no factual predicate for the presumption and because it is constitutionally impermissible for a state to make such invidiously discriminatory assumptions. Under the Fourteenth Amendment the State may not take invidiously discriminatory action even in situations where a private citizen could.

Section 12 of the Probate Act contains another defect fatal to its validity under the Equal Protection Clause. The statute groups illegitimate children into sub-classes. For example, illegitimate children can inherit by intestate succession from their mother, but not from their father. This classification among illegitimate children, based on the sex of the deceased parent, cannot be linked to any valid state objective, and is invalid under recent decisions striking down such discrimination among children.

Finally, Section 12 of the Probate Act invidiously discriminates against women. The effect of Section 12 of the Probate Act is to assist the surviving father in meeting his financial and other obligations to the child,

while denying similar assistance to the surviving mother. This result is accomplished by making the deceased mother's estate available as a means of support to the child, supplementing the resources of the surviving father. The surviving mother, however, cannot receive comparable help from the deceased father's estate. This discrimination is particularly perverse in light of the clear economic disadvantage of surviving mothers as compared to surviving fathers. The economic disadvantage differentially burdens the entire nature and quality of the surviving mother's relationship to her child. Sex-based discriminations have been repeatedly condemned by this Court; a similar result is compelled here as the discrimination advances no legitimate interest of the state, while frustrating the state's valid concern for the welfare of minors.

Section 12 of the Probate Act, therefore, discriminates against and among illegitimate children, and against surviving mothers. These discriminations are invidious and further no legitimate state interest. The arbitrary and irrational classification of children by the legitimacy of their birth cannot be harmonized with the constitutional demand of equal protection, that those similarly situated be treated even-handedly by the state. This Court can accord full measure to this command by vacating the heirship order entered below, and declaring Section 12 of the Probate Act to be unconstitutional.

ARGUMENT

The question in this case is whether a state probate code provision which is a criss-cross of discriminations against illegitimate children, among illegitimate children,

and against women can withstand the Constitutional scrutiny which this Court has increasingly focused on provisions which disadvantage illegitimate children or women.

I.

THE ILLINOIS PROBATE ACT INVIDIOUSLY DISCRIMINATES AGAINST ILLEGITIMATE CHILDREN.

Deta Mona Trimble, five years old, has been denied the right to inherit the estate of her father (who lived with her and supported her until his death) solely because she is an illegitimate child. This unjust and illogical result has been mandated by Sec. 12 of the Illinois Probate Act, which makes illegitimate children the heirs of their mothers, but which excludes illegitimate children from intestate succession from and through their fathers. Ill. Rev. Stat., ch. 3, Sec. 12; *In re Estate of Karas*, 61 Ill.2d 40 (1975). Deta's father, Sherman Gordon, never married; thus, were Deta a legitimate child, she would inherit her father's entire estate under Illinois state law.[1]

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[1] Ill.Rev.Stat., ch. 3, §11(2): (Rules of Descent and Distribution)

> The intestate real and personal estate of a resident decedent and the intestate real estate in this state of a non-resident decedent after all just claims against his estate are fully paid, descends and shall be distributed as follows:
>
> * * *
>
> Second, when there is no surviving spouse but a descendant of decedent: the entire estate to the decedent's descendants per stirpes.

The Illinois Probate Act thus discriminates both against and among illegitimate children. It classifies children on the basis of the status of their birth, denying inheritance rights only to those who are illegitimate. This Court in recent years has repeatedly condemned statutory schemes which "invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez v. Perez*, 409 U.S. 535, 538 (1973). Moreover, the Act divides illegitimate children into two classes, those who survive their mothers and those who survive their fathers, granting intestate succession rights to the former while denying such rights to the latter. These classifications are invidious, arbitrary and capricious. They further no legitimate or rational state purpose and violate the Equal Protection Clause of the Fourteenth Amendment under any standard of review this Court may apply.

A. DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN IS SUSPECT AND THE STATUTE AT ISSUE SHOULD BE SUBJECTED TO STRICT JUDICIAL SCRUTINY.

In deciding this case the Illinois Supreme Court relied on the immediately preceding case of *In re Estate of Karas*, 61 Ill.2d 40 (1975). In *Karas* the Court did not actually discuss the underlying question of whether discrimination against illegitimate children should be suspect. It only noted, correctly, that this Court has not explicitly ruled such discrimination suspect, and it summarily dismissed the argument. 61 Ill. 2d at 51-52. Although this Court has not yet declared discrimination against illegitimate children to be subject to strict

scrutiny, the recent illegitimacy decisions do support the conclusion that strict scrutiny is appropriate.[2] Moreover, the statutory scheme presented here is typical of that of 21 states. (The twenty states besides Illinois are listed in the Appendix to this Brief.)[3] An

[2] This Court's opinions in cases involving classifications based on legitimacy, and in particular the apparent anamoly of the early illegitimacy decision in *Labine v. Vincent*, 401 U.S. 532 (1971), have caused some confusion in the lower courts, some criticism of *Labine*, and a general pattern in which decisions relying on *Labine's* rationales have been reversed on appeal, while decisions distinguishing *Labine* and relying on subsequent cases have been affirmed. *Compare Norton v. Weinberger*, 364 F. Supp. 1117 (D. Md. 1973), *vacated and remanded* 418 U.S. 902 (1974), *original opinion adhered to*, 390 F. Supp. 1084, *jurisdiction postponed to hearing on merits*, 422 U.S. 1054 (1975); *Lucas v. Secretary of H.E.W.*, 390 F. Supp. 1310 (D.R.I., 1975), *probable jurisdiction noted*, ____ U.S. ____, 96 S. Ct. 32, 46 L.Ed.2d 36 (1975); *Tanner v. Weinberger*, 525 F.2d 51 (6th Cir., 1975); *Eskra v. Morton*, 524 F.2d 9 (7th Cir., 1975), *reversing* 380 F. Supp. 205 (W.D. Wisc., 1974); *Beaty v. Weinberger*, 428 F.2d 300 (5th Cir., 1973), *aff'd.* 418 U.S. 901 (1974); *Parker v. Sec'y of H.E.W.*, 453 F.2d 850 (5th Cir., 1972); *Severance v. Weinberger*, 362 F. Supp. 1348 (D.D.C., 1973); *Jimenez v. Weinberger*, 353 F. Supp. 1136 (N.D. Ill., 1973), *rev'd.* 417 U.S. 628 (1974); *New Jersey Welfare Rights Organization v. Cahill*, 349 F Supp. 491 (D.N.J., 1972), *rev'd* 411 U.S. 619 (1973); *Williams v. Richardson*, 347 F. Supp. 544 (W.D.N. Car., 1972); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md., 1972), *aff'd.* 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn., 1972), *aff'd* 409 U.S. 1069 (1972); *Weber v. Aetna Casualty & Surety Company*, 257 La. 424, 242 So.2d 567 (1971), *rev'd.* 406 U.S. 164 (1972); *Green v. Woodard*, 40 Ohio App.2d 101, 318 N.E.2d 397 (Court of Appeals of Ohio, Cuyahoga County, 1974).

[3] With the exception of Louisiana, the other 29 jurisdictions allow illegitimate children to inherit from either parent, *see* the Appendix to this brief. Louisiana is unique in barring illegitimate children from inheriting in intestacy from either parent.

unambiguous holding by this Court that such statutes are subject to strict scrutiny would effectively settle the issue of their validity. Therefore, although the provisions at issue here are unconstitutional under any applicable standard of review, appellants urge this Court to adopt the "strict scrutiny" test.

Illegitimacy shares all of the relevant characteristics that have been the bases for the Court's designations of other classifications as "suspect." Recently, four members of this Court (expressing the view that classifications based on sex are suspect) in *Frontiero v. Richardson*, 411 U.S. 677 (1973), described certain criteria particular to suspect classes, characteristics shared by classifications based on illegitimacy. Illegitimacy,

> . . . like race and national origin, is an immutable characteristic determined solely by the accident of birth, [therefore] the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .' *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

The reliance on *Weber*, an illegitimacy case, is logical and appropriate. Illegitimacy, like race and national origin, is an unalterable condition, a condition over which the children so labeled have no control, a condition they are powerless to change, a condition

bearing no relation to ability to perform or to contribute to society, a condition bearing no relationship to individual responsibility.[4]

This Court has recognized, in many cases dealing with classifications based on race, alienage, and national origin, that invidious discrimination against groups on the basis of the conditions of their birth or ancestry is constitutionally suspect. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Oyama v. California*, 332 U.S. 633 (1945). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1942). This statement was recently adopted by the Seventh Circuit Court of Appeals in striking down a discrimination against illegitimate children based on

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[4] One hundred years ago this Court recognized injustice in a similar context, explaining the Constitutional prohibition against Forfeitures of the Blood:

> In England, attainders of treason worked corruption of blood and perpetual forefeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. *Wallach v. Van Riswick*, 92 U.S. 202, 210 (1875)

Discrimination against illegitimate children has been compared to attaching "an archaic corruption of the blood, a form of bill of attainder, "*King v. Smith*, 392 U.S. 309, 336 n.5 (1968), Douglas, J., concurring, and with a "badge of ignobility" violative of Art 1, §9, Clause 8 of the Constitution, *Eskra v. Morton*, 524 F.2d 9, 13 n.8 (7th Cir., 1975).

Wisconsin probate law. *Eskra v. Morton,* 524 F.2d 9, 13 (1975).

The disability based on birth is graphically illustrated by Deta Mona Trimble's case. A five-year old girl, born an illegitimate child, she is relegated by the Illinois Probate statute to second-class citizenship. There is no way that she could ever take any act to alter her status. As to her, illegitimacy is an uncontrollable accident of birth.

The stigma associated with certain classifications has been the other major factor in the Court's treatment of them as suspect. Illegitimacy shares with other such statuses the fact that designation by these classifications subjects a child to "a stigma of inferiority and a badge of opprobrium."[5] This Court has clearly recognized that illegitimate children share this experience with other suspect classes, in *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972):

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the *social opprobrium suffered by these hapless children,* but the Equal Protection Clause does enable us to strike down discriminatory laws

[5] Note, *Developments in the Law of Equal Protection,* 82 Harv. L. Rev. 1065, 1127 (1969).

> relating to *status of birth*[14] where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise. 406 U.S. 164, 175-176.[6]

These views were specifically reiterated in *Jimenez v. Weinberger,* 417 U.S. 628, 632 (1974).

The sociological and psychological literature completely supports the Court's understanding of the opprobrium suffered by illegitimate children. *See,* for example, Krause, *Illegitimacy, Law and Social Policy* (1971); Krause, "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 477 (1967); and "Illegitimacy," Vol. 7, *Encyclopedia of the Social Sciences,* 579 (1935). The likelihood that any classification on the basis of illegitimacy will subject a child so classified to such opprobrium, ridicule and condemnation, is great enough to establish differential treatment of illegitimacy as suspect.

Moreover, illegitimate children are a "discrete and insular minority" which is disadvantaged in the majoritarian political process and which merits special protection by the courts. *See* Mr. Justice Stone's footnote in *United States v. Carolene Prod. Co.,* 304 U.S. 144, 153 n.4 (1938); *In re Griffiths,* 413 U.S. 717, 721 (1973); *Sugarman v. Dougall,* 413 U.S. 634, 642 (1973). In 1970, 10.1% of the children born in the United States were illegitimate. That same year 13.43%

[6] Emphasis added, Footnote 13 is omitted. Footnote 14 states: "See *Graham v. Richardson,* 403 U.S. 365 (1971); *Hunter v. Erickson,* 393 U.S. 385 (1969); *Brown v. Board of Education,* 347 U.S. 483 (1954); and see also *Hirabayashi v. United States,* 320 U.S. 81 (1943)." All of the cases referred to concern suspect classifications.

of the children born in Illinois were illegitimate.[7] But, in large part due to the stigma which would lead illegitimately-born persons to avoid identifying themselves, illegitimate children do not wield the influence that even these limited numbers warrant (a criterion suggested by Justice Stone), and so are subject too easily to statutory discrimination.

Thus, illegitimate children, as a group, bear "the traditional indicia of suspectness" described by the Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). They are

> . . .saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection. . .

This Court recognized, in *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), that illegitimacy meets suspect class criteria, as is illustrated by the passage from *Weber* quoted above, at pp. 16-17. Indeed, two members of this Court have suggested that the classification of illegitimacy has already been recognized, at least in certain contexts, to be suspect. Justice Stewart, concurring in *Rodriguez, supra*, at 60,

[7] U.S. Bureau of Census, *Statistical Abstract of the United States: 1974* (95th edition), Washington, D.C., p. 56. The rate of illegitimacy among blacks is somewhat higher: in the United States in 1970 it was 34.93% *Id.* One commentator has noted the mutually reinforcing effect of a double stigmatization: "The exceptions to this liberal trend [in treatment of illegitimate children] in the United States in the early 1960's included considerable criticism of low-income Negro families who had repeated illegitimate births." Vincent, "Teenage Unwed Mothers in American Society," XXII, No. 2 The Journal of Social Issues 22, 31 (April, 1966).

and Justice Marshall, dissenting in *Rodriguez*, at 108. In *Frontiero v. Richardson*, 411 U.S. 677, 681 (1973), as mentioned, four Justices cited *Weber, supra*, to identify criteria of suspectness. And dissenting in *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973), Justice Rehnquist aligned illegitimacy with the traditional suspect classes (distinguishing alienage): "a status or condition such as illegitimacy, national origin or race, which cannot be altered by an individual."[8]

In sum, this Court's past expressions and applications of this test represent varying articulations and shadings of a common theme: the historical and ongoing imposition of political, social and legal disabilities and isolation upon a group makes appropriate a close scrutiny of a discrimination against the group. Where the legal classification at issue perpetuates or intensifies the disabilities, and/or further stigmatizes and isolates the group, then that classification can only be justified by a compelling governmental interest. As this Court said in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954):

> To separate [these children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and

[8] Two federal district courts have concluded discrimination against illegitimate children should be a suspect classification. *Lucas v. Secretary of HEW*, 390 F. Supp. 1310, 1316-1319 (D.R.I. 1975), *probable jurisdiction noted*, 96 S. Ct. 32, (1975); *Doe v. Norton*, 365 F. Supp. 65, 79 n.23 (D. Conn. 1973), *vacated and remanded on other gds. sub nom. Roe v. Norton*, 422 U.S. 391 (1975). See also *Eskra v. Morton*, 380 F. Supp. 205, 215 (W.D. Wisc. 1974), *rev'd on other grounds*, 524 F.2d 9 (7th Cir. 1975); *Severance v. Weinberger*, 362 F. Supp. 1348, 1353 n.15 (D.D.C. 1973).

> minds in a way unlikely ever to be undone. . . The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.

The historical discrimination perpetuated by this law can only be interpreted as imputing lesser worth to the illegitimate children. And the denotation of inferiority by law and society can only create within the faultless children themselves a diminution of feelings of self-worth. The historic and ongoing social opprobrium attached to the status of illegitimacy has been shown to have an effect on children analogous to that noted by the Court in *Brown*. As one commentator has stated:

> To give the illegitimate child an inferior status because, through no fault of his own, his parents were never joined in an easily dissolved union is a hypocrisy which can only frustrate and alienate him from the society which created his inferiority.[9]

Similarly, a 1958 study found that illegitimate children, when compared to legitimate children of similar economic status, showed differences in "adjustment," as well as lower I.Q.'s, and lower scores on the California Test of Personality. The study also found greater differences between the two groups as the children grew older, hypothesizing that the illegitimate children became increasingly aware of their socially interior status.[10]

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[9] Marcus "Equal Protection: The Custody of the Illegitimate Child," 11 Journal of Family Law 1, 17-18 (1971).

[10] Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 American Journal of Sociology 196 (1958).

In order to protect fully the rights of these children who have suffered "through the ages society's 'illogical and unjust' condemation," *Weber, supra,* 406 U.S. at 175, this and other discriminations against illegitimate children should be designated as suspect.[11]

Because the classification is suspect, this discriminatory statute, which denies to illegitimate children rights granted to all legitimate children, must be subjected to strict scrutiny and can be upheld only if it furthers a compelling state interest. *E.g., Oyama v. California,* 332 U.S. 633 (1948). Since, as will be shown in later sections, the statute is not even rationally related to any legitimate state purpose, it can not meet the strict scrutiny test.

B. THE INVIDIOUS DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN IS INCONSISTENT WITH THE STANDARDS ENUNCIATED BY THIS COURT IN CASES CONCERNING ILLEGITIMACY AND IN RELATED CASES

Since 1968, this Court has considered the constitutionality of discrimination against illegitimate children

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[11] This Court has also suggested that classifications against illegitimate children affect "sensitive and fundamental personal rights," another criterion for heightened scrutiny. *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 172 (1972). Cf. *Levy v. Louisiana,* 391 U.S. 68, at 71 (1968).

ten times;[12] in every case but one, *Labine v. Vincent*, 401 U.S. 532 (1971), the Court has found the classification involved to be offensive to illegitimate children's rights to Equal Protection, under either the Fourteenth Amendment or the Fifth Amendment. A review of these decisions makes it clear that *Labine* is an anomaly, so undermined by subsequent decisions that not only its standard of review and its rationale, but also its holding are of dubious validity.

Levy v. Louisiana, 391 U.S. 68 (1968), and *Glona v. American Guarantee and Liability Insurance Co.*, 391 U.S. 72 (1968), examined a Louisiana wrongful death statute. They found that the discrimination against illegitimate children impinged upon "intimate, familial relationships" and that "illegitimacy of birth has no relation to the wrong being compensated." 391 U.S. at 71. Mr. Justice Douglas said for the Court that "it is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant" to the harm complained of. 391 U.S. at 72.

In 1971 the Court decided *Labine*, which will be extensively discussed below. A year later, in *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164

[12] *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), *aff'd* 418 U.S. 901 (1974); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973); *Griffin v. Richardson*, 346 F. Supp. 1226 (D.Md. 1972), *aff'd.* 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D.Conn. 1972), *aff'd* 409 U.S. 1069 (1972); *Gomez v. Perez*, 409 U.S. 532 (1972); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Labine v. Vincent*, 401 U.S. 532 (1971); *Glona v. American Guarantee and Liability Insurance Company*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

(1972), this Court considered the constitutionality of a provision in the Louisiana Workmen's Compensation Act which discriminated against unacknowledged illegitimate children. The illegitimate children claimed workmen's compensation benefits after the death of their father, and were denied benefits because their legitimate half-siblings had exhausted the maximum allowable amount of compensation. The Court both noted that "sensitive and fundamental personal rights" were involved, 406 U.S. at 172, and used language appropriate to a decision that classifications based on illegitimacy are inherently suspect or otherwise deserving of heightened scrutiny, 406 U.S. at 175-176.[13]

In 1972 and 1973 this Court considered four other cases concerning the constitutional rights of illegitimate children, and after carefully distinguishing *Labine* in the opinion in *Weber*, the Court did not find it necessary to refer to *Labine* again. *Weber* controlled in *Gomez v. Perez*, 409 U.S. 535 (1973), and in *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), as it must have in the affirmances in *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd.* 409 U.S. 1069 (1972), and *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd.* 409 U.S. 1069 (1972), and as it must here.

In *Griffin v. Richardson, supra*, and *Davis v. Richardson, supra*, the Court affirmed decisions, holding *inter alia*, that "To distinguish [illegitimate children] from other children with the same needs and the same parent, solely on the basis of a condition of birth. . .is

[13] The full quotation appears at pp. 16-17, *supra*.

impermissible." *Davis v. Richardson,* 342 F. Supp. 588, 593 (1972), *aff'd.* 409 U.S. 1069 (1972).

Gomez v. Perez, 409 U.S. 535 (1973), invalidated a Texas statute which denied illegitimate children any right to support from their fathers. In a *Per Curiam* opinion, the Court recognized the legitimate state interest in avoiding difficult problems of proof, 409 U.S. at 538, but, citing both *Weber* and *Levy*, broadly declared that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U.S. 535, 538.

In *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973), (hereinafter "*N.J.W.R.O. v. Cahill*") the plaintiffs challenged a provision of the New Jersey "Assistance to Families of the Working Poor" program, on the grounds that its limitation only to families composed of "two adults of the opposite sex ceremonially married to each other" and their children effectively discriminated against illegitimate children. In its *Per Curiam* ruling, the Court cited *Weber, Levy, Gomez, Davis,* and *Griffin, supra.* Again, although the standard of review was not specified, the Court rejected a proferred state interest in preserving and strengthening family life.

In 1974, *Jimenez v. Weinberger,* 417 U.S. 628 (1974), struck down a provision of the Social Security Act which prohibited illegitimate children, born after the onset of their father's disability, from receiving Social Security benefits. *Jimenez* found it unnecessary to declare illegitimacy classifications suspect, but it did repeat the recitation of suspect-type criteria from *Weber* (see pp. 16-17, *supra*), 417 U.S. at 632, and incorporated *Weber's* general condemnation of such

classifications. While recognizing that the classification at issue was aimed at the legitimate goals of preventing spurious claims and ameliorating the problems attendant to determining paternity, the Court found the provisions unconstitutional, not because they were totally irrational or unrelated to that purpose, but because they were both "over-inclusive" and "under-inclusive." 417 U.S. at 636, 637. Such distinctions are not normally used in minimal equal protection scrutiny, where the classification need not be made "with mathematical nicety," *Lindsley v. National Carbonic Gas Co.,* 220 U.S. 61, 78 (1910). See Justice Rehnquist, dissenting, *Jimenez,* 417 U.S. at 638-641. The language and standards of *Jimenez* thus indicate that some form of heightened scrutiny was being applied.

Finally, in *Beaty v. Weinberger,* 418 U.S. 901 (1974), this Court affirmed the ruling of the Fifth Circuit, 478 F.2d 300 (5th Cir. 1973), invalidating a provision parallel to that in issue in *Jimenez.*

In sum, the decisions of this Court concerning illegitimacy show a distinct trend toward more than minimal scrutiny. The early decision in *Labine v. Vincent,* 401 U.S. 532 (1971), is an apparent exception, for it suggests in passing a standard of review even lower than the traditional minimal standard: "the power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State." *Labine v. Vincent,* 401 U.S.

532, 538.[14] As noted by the four dissenting justices in *Labine*, the Court's refusal to ". . .consider in this case whether there is any reason at all, or any basis whatever, for the difference in treatment that Louisiana accords to publicly acknowledged illegitimate and to legitimate children," 401 U.S. at 548, intimates that

> . . .the Fourteenth Amendment's Equal Protection Clause is inapplicable to subjects regulable by the States—that extraordinary proposition would reverse a century of constitutional adjudication under the Equal Protection and Due Process Clauses. It is precisely state action which is subjected by the Fourteenth Amendment to its restraints. It is, to say the least, bewildering that a Court that for decades has wrestled with the nuances of the concept of "state action" in order to ascertain the reach of the Fourteenth Amendment, in this case holds that the state action here, because it is state action, is insulated from these restraints. *Id.* at 549.

This aspect of *Labine* has come under considerable analysis and criticism, and this Court has completely abandoned the *Labine* level of analysis in the later illegitimacy cases and in *Reed v. Reed*, 404 U.S. 71 (1971). *Reed* examined an Idaho state law, which, like the *Labine* statute, was established to regulate the intestate disposition of a decedent's property. *Reed* found the sex discrimination in such a law not to bear

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[14]At 401 U.S. 532, n.6, the Court also commented:

Even if we were to apply the "rational basis" test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and directing the disposition of property left within the State. (Emphasis added)

a *"fair and substantial relation to the object of the legislation,* so that all persons similarly circumstanced shall be treated alike." 404 U.S. at 75-76. (Emphasis added.) Since, as will be shown, *Reed* is being cited by lower courts as evidence for a form of heightened scrutiny, any inference from *Labine* that state action in the probate area generally or in the probate of intestate property specifically is insulated from equal protection scrutiny is incorrect. *Reed* shows that state action in this field is subject to normal review, and the level of such review is, as always, dependent in large part on the identity and characteristics of the group against which the discrimination is directed. *Cf. Evans v. Newton*, 382 U.S. 296 (1966); *Pennsylvania v. Board of City Trusts*, 353 U.S. 230 (1957); *Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975).

In this context, *Reed* and the later illegitimacy cases, from *Weber* through *Jimenez*, establish that some heightened scrutiny is appropriate here. A number of lower courts have concluded that this Court's opinions in certain cases, including particularly the illegitimacy cases like *Weber* and the sex cases like *Reed*, have created a "third tier" of judicial scrutiny, between strict scrutiny and minimal review, in effect a reinvigorated standard of review, at least in cases involving invidious discrimination against groups that bear many of the indicia of suspectness but have not been designated

suspect *per se*.[15] In particular, *Reed v. Reed*, in requiring that the proferred state interest bear "a fair and substantial relationship" to the legislative goal, requires close scrutiny of the nature of the discrimination and of both the governmental interest urged in support of the provision and the means used to further that interest.

Regardless of the label attached to such review by the lower courts, the crucial factor here is that *Reed*, read with the illegitimacy cases, simply requires that the instant classification be deemed invidiously discriminatory against a particular disadvantaged group; this action by the State must be scrutinized for a fair, substantial or significant relation to permissible statutory purposes. Even if this Court, then, does not apply strict scrutiny, the instant classification against illegitimate children is, at a minimum, approximately weighed and scrutinized under a vigorous, means-oriented inquiry, which will require, at least, that the classification bear a "fair and substantial relation," *Reed*, 404 U.S. at 76, or "significant relationship,"

[15]See, *e.g.*, *Berkelman v. San Francisco United School District*, 501 F.2d 1264, 1269 (9th Cir. 1974); *Eslinger v. Thomas*, 476 F.2d 225, 230-231 (4th Cir. 1973); *Green v. Waterford Board of Education*, 473 F.2d 629 (2nd Cir. 1973), *Women's Liberation Union of Rhode Island v. Israel*, 379 F. Supp. 44, 49-50 (D.R.I. 1974), *aff'd.* 512 F.2d 106 (1st Cir. 1975), *Eskra v. Morton*, 380 F. Supp. 205, 216-217 (W.D. Wis. 1974), *reversed on other gds.*, 524 F.2d 9 (7th Cir. 1975); *O'Neil v. Dent*, 364 F. Supp. 565, 578 (E.D.N.Y., 1973); Gunther, *The Supreme Court, 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

Weber, 406 U.S. at 175, to articulated and legitimate governmental purposes.[16]

Subsequent decisions, then, from *Reed* and *Weber* through *Jimenez*, have undermined the validity of the standard of review utilized by the majority in *Labine*. *Weber v. Aetna Casualty Company* subsequently engaged in a rigorous analysis of an illegitimacy-based classification, and narrowed *Labine* substantially. The fact that *Labine* is not even mentioned in *Gomez v. Perez*, *N.J.W.R.O. v. Cahill* and *Jimenez v. Weinberger*, *supra*, while admittedly legitimate governmental interests were rejected as insufficient justification for the discriminations against illegitimate children, can only be taken as further evidence of the demise of the rationales, at the least, of the *Labine* decision.

One last factor that isolates *Labine*, radically distinguishing it from all the other illegitimacy cases and from this case, should be noted. In this and other contexts, this Court has closely scrutinized total exclusions of groups of children or families from statutory coverage, while taking a more lenient view in cases involving the relative quality and level of

[16]*Reed v. Reed*, 404 U.S. 71, 75-76:

> The Equal Protection Clause of that Amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920).

inclusions.[17] In all of the other illegitimacy cases the Court has struck down total exclusions from governmental benefits or other statutory coverage. In *Labine*, by virtue of the unusual Louisiana law, all minor illegitimate children had a substantial and enforceable permanent right to support against the estate. *See* 401 U.S. at 533, 534 n.2. An illegitimate child in Illinois, like Deta Mona Trimble, on the other hand, is left with no rights after the father's death. She is excluded from *any* statutory protection, like the children in *Weber, Gomez, Jimenez, N.J.W.R.O., et al.*

In sum, this Court should subject the statute to close scrutiny. Moreover, as the next section will show, there is no justification whatsoever for the statutory discrimination. *Labine* should be explicitly overruled. If not overruled, it should be at least distinguished and confined, so that illegitimate children, at a minimum, receive equal rights in intestacy with legitimate children, whenever their paternity has been adjudicated by a state court or otherwise determined to the satisfaction of the State.

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[17]Compare, e.g., *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 620 (1974); *N.J.W.R.O. v. Cahill*, 411 U.S. 619 (1973); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd.* 409 U.S. 1069 (1972); and *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd.* 409 U.S. 1069 (1972), with *Dandridge v. Williams*, 397 U.S. 471 (1971). See also *Labine*, 401 U.S. at 535-536, distinguishing *Levy v. Louisiana*, 391 U.S. 68 (1968): "Under those circumstances the Court [in *Levy*] held that the State could not *totally* exclude from the class of potential plaintiffs illegitimate children. . ." (Emphasis added).

II.

THE INVIDIOUS DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN IN THE ILLINOIS PROBATE ACT IS NOT SUBSTANTIALLY OR RATIONALLY RELATED TO ANY LEGITIMATE STATE PURPOSE AND DENIES APPELLANTS EQUAL PROTECTION OF THE LAW.

In this case the Illinois Supreme Court has relied on *In Re Estate of Karas*, 61 Ill. 2d 40 (1975), which in turn relied on *Labine v. Vincent*, 401 U.S. 532 (1971). In so doing, the Illinois Supreme Court offered three possible state interests furthered by the statutory provisions of the Probate Act which deny illegitimate children the right to inherit from fathers who die intestate, while granting intestate succession rights to legitimate children. The Illinois Supreme Court did not adequately address the arguments that Deta Mona Trimble's case, in particular, presented very different questions than either *Labine* or *Karas* and that the Illinois statute is substantially different from the unique Louisiana scheme at issue in *Labine*. Moreover, as will be shown, the "justifications" put forward by the Illinois Supreme Court do not serve any legitimate or rational state interest, much less do they suffice to meet strict scrutiny or the scrutiny required by this Court's decision subsequent to *Labine*. When examined under the analysis developed in more recent cases, each of the posited rationales is seen to have been abandoned by this Court and/or other courts, while none of the posited purposes is furthered, significantly or otherwise, by the classification at issue.

Therefore, under any standard of review applicable to these classifications based on legitimacy of birth, the

statute violates appellants' right to equal protection of the law.

A. THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN FAILS TO SUPPORT ANY LEGITIMATE STATE INTEREST IN PROTECTING AND STRENGTHENING FAMILY LIFE.

The first rationale offered to support these classifications is the state interest "in the promotion of family relationships," *Karas*, 61 Ill. 2d at 48, one of the interests mentioned by the *Labine* court as being a function committed to the states. *Labine* 401 U.S. at 538. The Illinois court neither elaborated on the nature and scope of this interest, nor attempted to explain the relationship to the Probate Act's discriminatory provision to this interest; the court merely cited *Labine*, and stated that the Illinois statutes further the same objective. *Labine* also did not scrutinize the relationship between the classification at issue and the state purpose allegedly furthered thereby. As will be shown, moreover, this rationale has been abandoned in later cases as inappropriate in considering discrimination against innocent illegitimate children, an abandonment not considered in *Karas*.

Assuming, *arguendo*, that a permissible state interest in promoting and strengthening family life may be discerned in the Probate Act, the classification contained in § 12 promotes this interest, if at all, in a manner offensive to the Constitution. This rationale assumes that in this context sanctions directed against the offspring will somehow discourage the parents from engaging in non-marital relations. This assumption has

been seen by the Court to be irrational and contrary to valid conceptions of human behavior. Even if such a sanction were effective, moreover, it would be impermissible. The fundamental precept that legal benefits and burdens be related to merit and responsibilities is incorporated in the prohibition of the Equal Protection Clause against classifications unrelated to any legitimate state purpose. Section 12 of the Probate Act defies this elementary concept of fundamental fairness; it acts to penalize an innocent child, who is powerless either to prevent the conduct at which the statute is directed or to alter the status of her birth.

While repeatedly invalidating, on Equal Protection grounds, statutes which discriminate against illegitimate children, this Court has noted, in the strongest possible language, that to vent society's opprobrium toward "irresponsible liaisons" on the offspring of the liaison is "illogical and unjust." *Weber*, 406 U.S. 164, 175. More specifically, *Weber* rejected the rationality of any assumption that denying benefits to illegitimate children (or even their parents) will discourage illicit relations among the parents:

> The Louisiana Supreme Court emphasized strongly the State's interest in protecting "legitimate family relationships," 257 La. at 433, 242 So.2d, at 570, and the regulation and protection of the family unit have indeed been a venerable state concept. We do not question the importance of that interest; what we do question is how the challenged statute will promote it. As was said in *Glona*:
>
> > "[W]e see no possible rational basis. . .for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy

> will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." *Glona v. American Guarantee and Liability Insurance Co., supra,* at 75
>
> Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation. *Weber,* 406 U.S. at 173.

In short, *Weber* concluded that "the state interest in legitimate family relationships is not served" by a statute which penalizes the child, "an ineffectual–as well as unjust–way of deterring the parent." 406 U.S. at 175-176.[18]

This portion of *Weber* was applied in *Eskra v. Morton,* 380 F. Supp. 205, 217 (W.D. Wis. 1974), in considering a federal statutory scheme which incorporated Wisconsin's probate code insofar as it disinherited illegitimate children:

> An explicit statement of the deterrent theory would be: that men or women would refrain from engaging in non-marital intercourse if they were aware that children so conceived would be barred from heirship in the estate of their mothers' parents, siblings, aunts, uncles and other lineal and collateral kindred. *Weber* appears to be decisive on this point. If it "can [not] ... be thought that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation" (406 U.S. at 173), if

[18]Rather than punishing the child there exist alternative means to "promote family life" which would burden or encourage the parent alone. *See* Krause, "Protection for the Illegitimate," 65 Mich. L. Rev. 477, 493-495 (1967).

> penalizing an illegitimate child by withholding workmen's compensation benefits from the child is "an ineffectual–as well as unjust–way of deterring the parent" from extra-marital intercourse (406 U.S. at 175), it seems even more clear that it cannot be thought that such deterrence will be achieved by the rather remote sanction which § 237.06 visits upon illegitimate children.

The Seventh Circuit Court of Appeals agreed with this conclusion, *Eskra v. Morton,* 524 F.2d, 13-14 n. 13 (7th Cir. 1975):

> Significantly, in *Weber,* the Court did not identify the state interest in rules designed to establish, protect, and strengthen family life as a basis for the decision in *Labine,* even though that interest had been mentioned in the *Labine* opinion itself, *see* 401 U.S. at 538, 92 S. Ct. 1400, and had provided the first justification for the statute identified by Judge Tate in his opinion for the Louisiana Court of Appeals. *See Succession of Vincent,* 229 So. 2d 449, 452 (1970). In part II of its opinion in *Weber,* the Court expressly rejected that interest as justifying a discrimination against illegitimates claiming the benefits of Workmen's Compensation. *See* 406 U.S. at 173-174, 92 C. St. 1400. The existence and importance of that state interest is unquestioned. What is questionable is whether that interest is served by a statutory discrimination against an illegitimate child. There appears to be no serious claim that these laws–any more than the criminal abortion statutes–have been effective in forestalling the conduct which creates illegitimate children. *See Roe v. Wade,* 410 U.S. 113, 148, 93 S. Ct. 705, 35 L. Ed. 2d 147. Moreover, even if we make the dubious assumption that the discrimination against illegitimates tends to deter parental misconduct, we do not believe that the Court would regard the punishment of

innocent persons as an acceptable form of deterrence.[19]

This Court's opinion in *N.J.W.R.O. v. Cahill,* 411 U.S. 619 (1973), represents a repudiation of the "promotion of family life" rationale equally as strong as *Weber.* New Jersey had adopted a state-funded welfare program specifically designed to aid "Families of the Working families as units, and despite the not unreasonable assumption that conditioning the receipt of such assistance upon the existence of a traditional family might encourage unmarried couples with children to marry, this Court, quoting from *Weber,* rejected the argument as unrelated to the needs and interests of the children involved. 411 U.S. 619, 621. If classifications based on illegitimacy could bear no rational relationship to the promotion of family life in the context of New Jersey's "Assistance to Families of the Working Poor," where the impact on the adult individuals who could conceivably remove the disabilities imposed on them (as cohabiting parents and applicants for assistance) as well as their children was quite direct, then the classifications in the Illinois Probate Act, which affect only the illegitimate child, who is powerless to change his status, obviously could never be found to bear any relationship, let alone a rational one, to the state

[19]*See also Miller v. Laird,* 349 F. Supp. 1034, 1045 (D.D.C. 1972); *Williams v. Richardson,* 347 F. Supp. 544, 549 (W.D.N.C. 1972); *Griffin v. Richardson,* 346 F. Supp. 1226, 1234-5 (D.Md. 1972), *aff'd.* 409 U.S. 1069 (1972); *Morris v. Richardson* 346 F. Supp. 494, 498-499 (N.D. Ga. 1972), *vacated* 593 (D. Conn. 1972), *aff'd.* 409 U.S. 1069 (1972); *In re Estate of Jensen,* 162 N.W. 2d 861, 878 (Supreme Ct. of N. Dakota, 1968).

objective of encouraging marriage and promoting family relationships.

Moreover, whatever marginal validity the "promotion of family life" rationale may have had with respect to the complex provisions of the Louisiana Civil Code, which consistently denied to illegitimate children rights which were accorded to legitimate children,[20] no consistent goal of promotion and preservation of a particular style of family life is remotely discernible in the Illinois statutory scheme. Illinois does not, as does Louisiana, equivalently limit an illegitimate child's rights to inherit from his mother.[21] In short, the Illinois Probate Act, by failing to provide consistent sanctions, as does Louisiana, does not even consistently purport to meet the impermissible goal of punishing the child in order to encourage the formalization of the parents' relationship.

Finally, the actual family ties of the unmarried parents and the child must be considered. The Louisiana scheme at issue in *Labine* is further distinguished by its partial promotion of family ties between the parent and child through the provisions of support rights, against the estate, for all illegitimate children; Illinois, on the other hand, has no specific provision allowing illegitimate children support from the estate of a decedent father. In Louisiana all illegitimate children received some form of protection. "Natural

[20]Louisiana Civil Code, Articles 198, 200, 202, 206, 242, 918-920.

[21]*Compare* Louisiana Civil Code, Art. 918, which allows an illegitimate child to inherit from his mother only if he has been acknowledged and if the mother dies leaving no other descendants, *with* Ill. Rev. Stat., ch. 3, § 12.

children" had limited rights in intestacy. Both "natural children" and the other defined group of illegitimate children, "bastards," had a right to claim support against the heirs-at-law including legitimate children. La Civ. Code Ann., Art. 240. Both the majority opinion (401 U.S. at 533) and Justice Harlan's additional concurring remarks (401 U.S. at 540) in *Labine* noted this support right. An illegitimate child in Illinois, on the other hand, is left unprotected after the death of his father, even where, as here, the father had acknowledged and was supporting the child pursuant to court order, and had no spouse or legitimate children. Illinois is inconsistent in its treatment of whatever relations do exist among mother, father, and child and both assumes no father-child relationship and burdens the mother-child relationship (see Sections III and IV, *infra*). The Illinois scheme thereby disrupts family life, because the

> . . .illegitimate child may suffer as much from the loss of a parent as a child born within wedlock. . .So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for her father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate child all lived in the home of the deceased and were equally dependent upon him for maintenance and support. *Weber*, 406 U.S. at 169-70.[22]

[22] *See also, Stanley v. Illinois*, 405 U.S. 645 (1972), where the Court gave recognition and constitutional protection to the basic legal and practical relationship between an illegitimate child and the father.

In short, this Court no longer will countenance a state "promoting" family relationships by punishing blameless illegitimate children. The Illinois Supreme Court erred by reaching back to this abandoned portion of *Labine*. Moreover, Illinois has an inconsistent scheme which burdens and thwarts family relationships between the child and his biological parents, in violation of decisions of this Court.

B. THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN FAILS TO SUPPORT ANY STATE INTEREST IN THE STABILITY OF LAND TITLES AND THE PROMPT AND DEFINITIVE DETERMINATION OF THE OWNERSHIP OF PROPERTY LEFT BY DECEDENTS.

The second rationale proferred by the Illinois Supreme Court to support the statutory provision is the obvious state interest in providing for the prompt and definitive determination of the ownership of property left by decedents, and specifically "prohibiting spurious claims." *Karas*, 61 Ill.2d at 48, 52-53. This was the factor cited in *Weber*, 406 U.S. at 170, as the rationale for *Labine*.

At the outset, it must be pointed out that the Illinois Supreme Court's reliance here on *Karas* and thereby *Labine* is somewhat disingenuous. Sherman Gordon was adjudicated to be Deta Mona Trimble's father by an Illinois Court in a paternity action brought pursuant to Ill.Rev.Stat., Ch. 106 3/4 § 51 *et seq*. The children in *Labine* and *Karas* had not been so adjudicated. *Labine* is completely inapposite on this point. Whatever validity the "prevention of spurious claims" or "difficulty of proof of paternity" or "stability of land titles" or

"prompt and definitive devolution of property" rationale may have in other contexts, it is simply inapplicable to a child whose paternity was definitively established by court decree prior to the death of her father.[23] Deta Mona Trimble has already definitively become her father's child for virtually all legal purposes. In that status her inheritance rights would neither create litigation nor delay nor complicate the disposition of her intestate father's property. She is, simply, his proven child, and Illinois "may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

Even in the broader context where there may be some minor proof problems, the interest in quick and definitive property disposition is insufficient to justify discrimination against illegitimate children. *Reed v. Reed*, 404 U.S. 71,76 (1971) directly rejected this interest as a sufficient justification for discrimination in the identical context of administration of estates:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy . . . [But to] give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.

[23]Illinois places enough confidence in paternity judgments to use such adjudications as a basis for subjecting to criminal penalties a father who does not support the child. Ill.Rev. Stat., ch. 68 § 24.

This Court, in cases involving discrimination against illegitimate children, against women, and in other areas where close scrutiny is involved, has not tolerated general and over-inclusive prophylactic rules which avoid the need for individualized determinations.[24]

As stated in *Gomez v. Perez*, 409 U.S. 535, 538:

> . . . there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a state to do so is "illogical and unjust." [*Weber*, at 175] We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable

[24]*Compare Turner v. Dept. of Employment Security*, ____ U.S. ____, 96 S.Ct. 249 (1975); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Reed v. Reed*, 404 U.S. 71 (1971) *with Weinberger v. Salfi*, 422 U.S. 749 (1975). As stated in *Stanley*, 405 U.S. at 656-657:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill or Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issue of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. [footnotes omitted.]

> barrier that works to shield otherwise invidious discrimination. *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972); *Carrington v. Rush*, 380 U.S. 89 (1965).

See also Jimenez v. Weinberger, 417 U.S. 628 (1974).

This Court's later decisions in the illegitimacy cases thus establish that the court is not unmindful that illegitimacy occasionally presents a problem of proof of paternity, and that the Court will give limited deference to the state or federal government's method of determining the validity of individual claims so long as the claim can be presented on an equal basis by illegitimate children.[25] But they also unequivocally establish that once paternity is determined, the Constitution requires that all children – whether legitimate or illegitimate – be treated equally, and that

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[25] An example of a probate statute which provides satisfactory standards for determining the validity of individual claims while eliminating invidious discrimination against illegitimate children is the Uniform Probate Code, adopted by 10 states (*See* Appendix to this brief), which provides as follows:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,
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> * * *
>
> (2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
>
> (i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
>
> (ii) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof . . .

Uniform Probate Code, Article 2-109.

the problems of proof connected with paternity do not mean that a "blanket and conclusive exclusion of a subclass of illegitimates is reasonably related to the prevention of spurious claims." *Jimenez v. Weinberger*, 417 U.S. 628,636 (1974).

In summary then, the concerns expressed in *Labine* respecting problems of proof, stability of land titles and prompt and definitive determination of the ownership of property have no applicability to those illegitimate children whose paternity has been adjudicated prior to the father's death. Moreover, these problems have, in the later illegitimacy cases before this Court, been found insufficient to support discrimination against any illegitimate children. And in *Reed, supra*, these concerns were found insufficient, in virtually the same statutory context as *Labine*, to support otherwise invidious discrimination.

C. THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN CAN NOT BE JUSTIFIED ON THE BASIS THAT IT RAISES NO INSURMOUNTABLE BARRIER TO INHERITANCE.

The Illinois Supreme Court in *Karas*, again drawing from *Labine*, attempted to justify the provisions of the Probate Act on the basis that they raise no "insurmountable barrier" to inheritance by an illegitimate child since the father could write a will. 61 Ill.2d at 52. Properly speaking, this isn't a rationale at all, but simply an attempt to disparage the impact the classifications have on illegitimate children. If the classifications further no legitimate state purpose, the

fact that they raise no "insurmountable barrier" to inheritance would hardly render them constitutional.

In *Reed v. Reed*, 404 U.S. 71 (1971), this court examined an Idaho law which, in regulating the disposition of an intestate decedent's property, discriminated against women. The statute was found to violate the Equal Protection Clause, even though, logically, the statutory preference to the male in issuing letters of administration of a person dying intestate could also have been altered by the decedent writing a will. Similarly, a statute giving preferences based on sex, race, religion, or some other arbitrary factor, in the actual devolution of property in intestacy would presumably be unconstitutional, even though the deceased would have faced no insurmountable barrier to writing a will and altering that disposition.

The options of the parents are not the crucial factor, as was recognized in *Weber*, 406 U.S. at 175 and *Jimenez*, 417 U.S. at 632, where this court held that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility and wrongdoing."[26] The action or inaction of the parent can not lead to the imposition of penalties on the child. See Section II-A, *supra*.

As the Seventh Circuit Court of Appeals said in the recent illegitimacy case involving intestate succession:

> We have some difficulty in evaluating the importance of the options open to the parents, since from the point of view of the child it really

[26]*See also N.J.W.R.O. v. Cahill*, 411 U.S. 619, 620; *Griffin v. Richardson*, 346 F.Supp. 1226, 1237, *aff'd.* 409 U.S. 1069 (1973).

> makes no difference whether options were nonexistent or simply not exercised.

Eskra v. Morton, 524 F.2d 9, 15 (7th Cir., 1975).

In short, the suggestion that an "insurmountable barrier" must be present before a violation of Equal Protection can be found is not borne out by the Equal Protection cases, much less by the illegitimacy cases. In the instances in which this Court has struck down discrimination against illegitimate children, there was normally some action that one parent or both parents could take or could have taken, whether it was marriage, acknowledgment, or even adoption, which would have altered the child's position.[27] These options did not suffice to justify the otherwise invidious discrimination.

Even if the "insurmountable barrier" rationale had general validity, it would be unavailable here. Sherman Gordon was a 28 year old man of marginal economic resources who died the victim of a homicide. Any legislative presumption that he could have left a will is unrealistic. In fact, as demonstrated by three studies on the subject, only about 15% of the adult American population, as a whole, leave wills. Specifically, one study, involving the first 500 adult residents of Cook

[27]The suggestion in *Labine*, 401 U.S. at 549, that in *Levy* there was an insurmountable barrier is incorrect. The child's position in *Levy* and *Glona* could have been altered by an acknowledgment. *See Glona v. American Guarantee Co.*, 391 U.S. 73, 79 (Harlan, J., dissenting). *See also N.J.W.R.O. v. Cahill*, 411 U.S. 619 (1973) and, in a more general context, *In re Griffiths*, 413 U.S. 717 (1973), where in spite of the fact that the alien could have applied for citizenship, the Court applied strict scrutiny. (Rehnquist, J., dissenting, 413 U.S. at 657).

County, Illinois who died in 1957, reveals that while 14.6% of these decedents had estates probated, of the decedents in the 20-29 age group of Sherman Gordon, none had estates probated, apparently because persons in that age group generally have limited property to probate.[28] Professor Dunham also found that in the occupational group of service employees, to which Sherman Gordon belonged as a porter at an automobile dealer, there were 55 decedents in his sample, 9 of whom had intestate estate proceedings, but not one of whom died with a will.[29] Considering these statistics, it would obviously be irrational for the legislature to conclude that any decedent, let alone one in circumstances comparable to those of Sherman Gordon, could, or would be likely to leave a will which might remove disabilities imposed on an illegitimate child. Much less does such a presumption justify discriminatory state action against the illegitimate child.

D. THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN MAY NOT BE JUSTIFIED BY THE PRESUMED INTENT OF THE DECEDENT.

The opinion below articulated no other state purposes served by the statutory classifications against

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[28] Allison Dunham, *The Method, Process and Frequency of Wealth Transmission At Death*, 30 Univ. of Chicago L.Rev. 241 (1963); *See also* Edward H. Ward and J.H. Beuscher, *The Inheritance Process In Wisconsin*, 1950 Wis.L.Rev. 393 (1950); Richard R. Powell and Charles Looker, *Decedent's Estates: Illumination From Probate and Tax Records*, 30 Col.L.Rev. 919 (1930) at 924.

[29] Dunham, *supra* at 245, table 3.

and among illegitimate children embodied in Sec. 12 of the Probate Act, nor does the Act itself articulate any objectives. It has been argued, however, that the purpose of any intestate succession statute is to effectuate the presumed intent of the decedents as to the disposition of their estates. In this context, it might be suggested that these classifications serve that purpose, that men presumptively do not want their illegitimate children to inherit from them. Even if the Court below, or the statute itself, had articulated such a purpose, the statute could not be found constitutional. This rationale is similar to an implication (tied to the argument discussed earlier that there is no insurmountable barrier) that the failure of intestate decedents to make a will merely aligns the statutory disposition of the property with the decedent's intent. That argument is untenable, and can not justify the action of the *state* in discriminating against illegitimate children. Indeed, the very core of the Fourteenth Amendment is its prohibition against discrimination by the state, as opposed to discrimination by private parties. As the Seventh Circuit recently stated:

> In our judgment, the presumed intent of intestate decedents is an unacceptable justification for a decision by the state which the state would otherwise be unable to justify. It is unacceptable, not because it is irrational to assume that there are significant numbers of private citizens who would intentionally punish children for the transgressions of their parents, but rather because such motivation on the part of the state is offensive to our concept of due process. In some communities it would not be unrealistic to assume that most decedents would discriminate in favor of, or against, members of a particular religious sect,

> race, political party, or perhaps even sex. But surely the state may not, for that reason alone, make comparable discriminatory choices. Just as private schools or private hospitals may place some arbitrary limits on the classes of people they will serve, so may testators make irrational choices in the distribution of their property. But when the choice is made by the government, the obligation to afford all persons equal protection of the laws arises.

Eskra v. Morton, 524 F.2d 9, 14 (7th Cir., 1975). *See also Evans v. Newton*, 382 U.S. 296 (1966); *Reed v. Reed*, 404 U.S. 71 (1971).

Moreover, even if "presumed intent" were a legitimate state purpose, any presumption by the state that fathers do not wish to leave property to illegitimate children is too speculative to be supportable.[30] In fact, a public opinion survey taken in Illinois indicates that a vast majority believe that an illegitimate child should have the same intestate succession rights accorded to legitimate children.[31]

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[30] *See U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973).

[31] A carefully selected cross-section of over 2000 persons were asked to choose one of the following alternatives:

a. Unless the father leaves a will in which he specifically gives his illegitimate child an inheritance, the illegitimate child should have no right to inherit from its father.
b. If the father does not leave a will, the illegitimate child should inherit from its father the same inheritance to which the child would be entitled if it were of legitimate birth.
c. If the father does not leave a will, the illegitimate child should inherit from its father enough to cover support needs until the child is able to go to work and earn its own living.

Of the persons asked, 64 percent stated they believed illegitimates should receive the same inheritance as legitimate children. Only 5 percent responded that illegitimates should get no inheritance. H. Krause, *Illegitimacy: Law and Social Policy*, pp. 318-20 (1971).

E. CONCLUSION: THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN IN THE ILLINOIS PROBATE ACT IS NOT RATIONALLY RELATED TO ANY VALID STATE PURPOSE, AND DENIES APPELLANTS EQUAL PROTECTION OF THE LAW UNDER ANY STANDARD OF REVIEW ADOPTED BY THIS COURT.

Every conceivable purpose offered in *Karas* and *Labine* to support the classification against illegitimate children in the Probate Act has been examined, and the classifications have not been rationally related to any of them. Certainly, under the more stringent standards of review that should be applied here, no justification exists for the Probate Act's distinction by legitimacy of issue; the critical link between classification and valid state purpose cannot be forged. Even under the most minimal standards of review, there is no rational basis for the State of Illinois affirmatively disinheriting illegitimate children whose paternity has been established. At the same time, the statute at issue affirmatively undermines ancillary state functions, including the imposition of support obligations, as will be discussed in the next two sections.

Deta Mona Trimble is Sherman Gordon's daughter and has been determined as such by the Illinois state courts. Their relationship was identical to that of any father and daughter. Nevertheless the Illinois Probate Act arbitrarily erects barriers based on the status of legitimacy of birth, excluding her from inheritance rights solely because she was born and remained "illegitimate." This statutory scheme offends any rudimentary conception of fundamental fairness. It is offensive to the beneficent command contained in the

phrase equal protection of laws–that like be treated alike–which forbids invidious discrimination of the type contained in the Probate Act. It is, as this Court has so frequently recognized, "illogical and unjust" to wreak the perceived sins of the parents on the head of an innocent child. *Weber*, 406 U.S. at 175-176.

III.

THE DISCRIMINATION AMONG ILLEGITIMATE CHILDREN PRESENT IN THIS CASE IS IRRATIONAL AND VIOLATES THE EQUAL PROTECTION CLAUSE.

The Louisiana scheme at issue in *Labine*, pernicious though it was, at least had some internal consistency. Louisiana did not, as does Illinois, discriminate among illegitimate children on the basis of the deceased parent's sex. Louisiana did not, as does Illinois, cut off many illegitimate children from all rights to the estate. The Illinois statute's constitutionality in these respects must be judged not under *Labine*, but under *Jimenez v. Weinberger*, 417 U.S. 628 (1974), and *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975), which are directly applicable here.

The decisions in cases from *Weber*, *supra*, through *Jimenez* reveal that both the standard of review articulated in *Labine* and the rationales offered therein to support the classification of children by legitimacy of birth in Louisiana's Probate Code have been repudiated, at least by implication, by this Court. The decision of the Illinois Supreme Court in this case, on the other hand, unjustifiably expands *Labine* by applying it to an entirely different statutory scheme. In

Labine the Court upheld certain complex and unique Louisiana provisions defining the rights of children. Illegitimate children are divided into two classes, "natural children" who must be acknowledged and whose parents must have been capable of marrying at the time of their conception, and "bastards," who are defined as all unacknowledged illegitimate children and those whose parents were incapable of contracting marriage at the time of their conception. Louisiana Civil Code, Article 202. The latter class is barred from inheriting from either parent, while "natural children" are granted limited rights of succession to the estate of either parent. *Id.*, Articles 918-920. Most important, Louisiana also specifically provided for support payments, in the form of "alimony," for *all* illegitimate minor children, from either parent, and from the estate left by either parent, even where the parent dies intestate. *Id.*, Articles 240-242. This last provision minimizes the negative impact of Louisiana's policies on the innocent children. The provision was noted in *Labine*, 410 U.S. at 533, 540.

The differences in Illinois are striking. First, instead of limiting the right of an illegitimate child to inherit from either parent, as does Louisiana, Illinois not only discriminates against illegitimate children as opposed to legitimate children, but also irrationally bifurcates the group of illegitimate children by sub-classifying invidiously on the basis of the sex of the decedent parent. The Illinois Probate Act mandates that illegitimate children inherit from their mothers in the same manner as do legitimate children. Illegitimate children who survive the deaths of their fathers, however, are absolutely barred from intestate succession. This exclusion applies whether or not the

father formally acknowledged them, supported them, or had been adjudicated, in a paternity or other court action, to be their father. The illegitimate child in Illinois is therefore stripped of the crucial prior protection of support by the death of the father; Illinois takes no steps to eliminate or minimize this impact.

In *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975), this Court invalidated a Social Security Act provision which denied benefits, based on the earnings of a deceased wife and mother, to a widower who had the couple's minor children in his care, while granting such benefits to a similarly situated widow. The Court found that a primary purpose of the challenged provision was to enable children of covered employees to receive the personal attention of the surviving parent. The classification was found to deny equal protection since it, *e.g.*, "discriminates among surviving children solely on the basis of the sex of the surviving parent." 420 U.S. at 651. The Act at issue here does precisely the same thing. And in *Green v. Woodard*, 40 Ohio App. 2d 101, 318 N.E.2d 397 (Ohio Ct. App. 1974), the court found unconstitutional a probate statute identical to that in issue here, on the grounds that it discriminated among illegitimate children based on the sex of the decedent parent. Analyzing *Labine* in light of subsequent decisions such as *Weber* and *Jimenez*, the Court found the intra-class discrimination not reasonably related to the purposes of intestacy statutes.

Second, Illinois has no specific provision allowing minor illegitimate children support from the estate of a decedent parent. In Louisiana all illegitimate children receive some form of protection, as discussed above. Where the father dies intestate, the minor child's right

to support continues. In other words, no action by the father is necessary to confer part of the estate on the minor child. An illegitimate minor child in Illinois, on the other hand, is left unprotected after the death of his father, unless the father takes action to protect the child. This is true even where, as here, the father previously had acknowledged and was supporting the child pursuant to court order. This total exclusion can only be altered by a parental action (*e.g.*, intermarriage or a paternal will) which protects the illegitimate child. Thus, unlike Louisiana, Illinois denies *all* rights to those among illegitimate children whose fathers took no affirmative action. Illinois thus punishes the child twice for the parents' failures: once, by stigmatizing him as an illegitimate child; and again, by terminating all rights against the estate, including support rights, because the father has taken no affirmative action.

These arbitrary categorizations among illegitimate children make the Illinois Supreme Court's total reliance on *Labine* even more inappropriate. Rather, *Jimenez v. Weinberger*, 417 U.S. 628 (1974), this

Court's most recent opinion on the subject of discrimination based on legitimacy, is applicable.[32]

The Illinois statute at issue here not only was the basis of the Social Security Act provision struck down in *Jimenez*, but is analogously structured to discriminate *among* illegitimate children as well as against them. While *Labine* dealt with distinctions between legitimate and illegitimate children, *Jimenez* grappled with the present scheme, which mixes an intent to discriminate against illegitimate children with an arbitrary sub-classification of illegitimates. The discrimination among illegitimate children, cumulative with the discrimination against illegitimate children, was

[32] Although *Jimenez* was concerned with classifications in the Social Security Act, the *Jimenez* children were actually barred from Social Security benefits by the operation of Ill. Rev. Stat., Ch. 3, Sec. 12, the statute contested here:

> Since the parents never married, appellants are classified as illegitimate children *under Illinois law and are unable to inherit from their father* because they are non-legitimated illegitimate children. Ill. Ann. Stat., Ch. 4 [*sic*], § 12.
>
> * * *
>
> The contested Social Security scheme provides, in essence, that legitimate or legitimated children (42 U.S.C. § 402(d)(3)), *illegitimate children who can inherit their parent's personal property under the intestacy laws of the State of the insured's domicile* (42 U.S.C. § 416(h)(2)(A)) . . . are entitled to receive benefits without any further showing of parental support. However, illegitimate children such as Eugenio and Alicia . . . who do not fall into one of the foregoing categories, are not entitled to receive any benefits. *Jimenez*, 417 U.S. at 630, 631 n.2 (emphasis supplied).

Similarly, *Eskra v. Morton*, 524 F.2d 9 (7th Cir. 1975), invalidated a federal statutory denial of inheritance rights to an illegitimate Indian child based on a Wisconsin statute analogous to the statute contested here.

found to be unconstitutional, being under-inclusive and over-inclusive. *Jimenez*, 417 U.S. at 637. Here the Probate Act is similarly under-inclusive, in the types of illegitimate children to whom it gives *some* protection and coverage; and it is over-inclusive in its sweeping prohibition against inheritance from the intestate father, apparently theoretically based on an excessively broad prophylactic rule aimed at proof problems. (See Section II-B, *supra.*) Nor is this discrimination rationally related to any permissible purposes. See Section II, *supra.* Rather, it unconstitutionally burdens the relationship of the child to the mother.

At the same time, the statute at issue undermines ancillary state functions. Under Illinois law, the father of a child born out of wedlock has a support obligation to the child identical to that of the father of a legitimate. *E.g.*, Ill. Rev. Stat., Ch. 23, Sec. 2-11 *et seq.*, Ill. Rev. Stat., Ch. 68, § 24 and § 50 *et seq.* Sherman Gordon was obligated to support Petitioner Deta Mona Trimble. Illinois law demanded no less, explicitly rejecting any distinction in this context between the fathers of legitimate children and fathers of illegitimate children. The law regarding support recognizes the obvious–that legitimate and illegitimate children alike share the same need for support, maintenance, and education. The intestate laws, however, defy this elementary proposition. Gordon's only child's need for support did not terminate on May 28, 1974, but the intestate law illogically decrees that his assets be distributed where there is no such legally cognizable need.

IV.

THE ILLINOIS PROBATE ACT INVIDIOUSLY DISCRIMINATES AGAINST WOMEN IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants here have also been harmed by the discrimination on the basis of sex embodied in Section 12 of the Illinois Probate Act. Under Illinois law, both the father and mother of a child, including an illegitimate child, have a variety of duties, including a duty to support the child. E.g., Ill. Rev. Stat., Ch. 23, Sec. 10-2; Ill. Rev. Stat., Ch. 68, Sec. 24; Ill. Rev. Stat., Ch. 106-3/4, Sec. 52. When one parent dies, the surviving parent obviously retains moral and legal duties to nurture, support and care for the child, and, as a practical matter, the burden of the legal duty becomes greater because it is no longer shared. Yet, despite the clear economic disadvantage of surviving mothers (compared to surviving fathers) as discussed below, existing law gives preference to and assistance in meeting these obligations to the surviving father. This discrimination on the basis of sex violates the equal protection rights of both the mother and the children. Again, this issue and this discrimination were not present in *Labine*, where the child had a right to support, yet no right to inherit, from the estates of both the father and mother.

The statute accomplishes this discrimination by providing that when the mother of the illegitimate child dies intestate, the illegitimate child is the "heir of his mother." Ill. Rev. Stat., Ch. 3, Sec. 12. The father, as the surviving parent, is, therefore, directly assisted in his

ongoing obligations by the fact that the child is legally entitled to money from the estate of the intestate mother. This also would make it easier for him to obtain or retain custody and care of the child. See *Stanley v. Illinois*, 405 U.S. 645 (1972). But when the father of the illegitimate child dies intestate, on the other hand, the child is barred from sharing the estate. The child's mother, his sole surviving parent, therefore has the far more onerous tasks of supporting a child who has no claim against his father's estate and replacing the support previously provided by the father. This will burden or frustrate the mother in obtaining, retaining, or exercising custody and care of the child. The statute therefore discriminates against women by failing to provide for their illegitimate children a legal right to inheritance equivalent to that granted to the illegitimate children of surviving male parents.

As has been mentioned previously, four Justices have declared discrimination against women to be suspect, *Frontiero v. Richardson*, 411 U.S. 677 (1973), but no definitive determination has been reached. Nevertheless, a number of the recent decisions involving discrimination against women have applied a rigorous review. A sex-based classification must "bear a fair and substantial relation" to a permissible articulated state purpose, in probate, as well as in all areas of state action. *Reed v. Reed*, 404 U.S. 71, 76 (1971). Judged by this standard, the classification here, a probate code provision which provides "dissimilar treatment for men and women who are . . . similarly situated," *Reed*, 404 U.S. at 77, denies equal protection of the law to appellants.

Weinberger v. Weisenfeld, 420 U.S. 636 (1975), considered provisions of the Social Security Act which discriminated on the basis of the sex of the surviving

parent. The Social Security Act provisions at issue granted benefits, based on the earnings of a deceased husband and father, to a widow and their children but denied such benefits, based on the woman's earnings, to her widower. The Court held that "The gender-based distinction of 42 U.S.C. Sec. 402(g) is entirely irrational." 420 U.S. at 651.

In the instant case, the negative impact of the statute on women, intertwined with the general economic disadvantage suffered by women, renders it particularly offensive. Recently, this Court upheld a tax preference given to widows but not widowers, stating:

> There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.
>
> * * *
>
> We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden. *Kahn v. Shevin*, 416 U.S. 351, 353, 355 (1974).

There can be little doubt that the outcome in *Kahn* would have been different if widowers had been the preferred group. But here, in an analogous situation, the statute *is* doing the opposite of what was approved in *Kahn*. Section 12 of the Illinois Probate Act aggravates, rather than cushions, the financial impact of the death upon the sex for whom the loss imposes a disproportionately heavy burden. As noted in *Kahn*, even when women are able to enter the work force, they are

paid proportionately less than their male counterparts. Female parents left with dependent children after the death of the father are in greater need of financial help in fulfilling their responsibility to support their children than would be men in the same situation. And yet, the statutory scheme challenged here disadvantages women and assists men who are otherwise identically situated.[33] It not only directly disadvantages women in economic terms, it also, as a consequence, differentially burdens the quality and nature of women's relationship with their children. This was specifically recognized in *Weisenfeld*, where the impact of the economic disadvantage was weighed primarily in terms of its effect on the quality of the parent-child relationship. Taking cognizance of the fact that economically disadvantaging the surviving parent forces that parent out of the home, this Court, citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), found that the statute burdened the parent in non-economic terms as well, specifically the parent's "constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Weinberger v. Weisenfeld*, 420 U.S. at 652.

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[33] As Justice Cadena, dissenting, asked rhetorically in *G____ v. P____*, 466 S.W.2d 41 (Ct. Civil Appeals, Tex. 1971), *reversed sub nom. Gomez v. Perez*, 409 U.S. 535 (1973):

> "May the illegitimate mother complain that she is denied the Equal Protection of the laws because her obligations to her illegitimate child are substantially greater than those imposed on the man who was her partner in the socially disapproved procreative act?" 466 S.W. 2d at 45, n.10.

The Court's ruling that discrimination on the basis of sex between sole surviving parents is irrational is controlling in the case at bar, where discrimination is imposed only on surviving mothers of out of wedlock children, solely on the basis of sex. The rulings in both *Weisenfeld* and *Stanley* on the constitutional protection to be accorded to the parental rights of fathers are directly applicable to the case at bar, since mothers are certainly entitled to no less protection.[34] If the father's relationship to his child, including the illegitimate child in *Stanley*, cannot be differentially burdened by state action, surely the mother's relationship cannot be either.

The statute at issue here thus perpetuates a long-standing invidious discrimination against the mothers of illegitimate children. The most meaningful sense in which the father and mother's relationship to the illegitimate child in our society has been differentiated is in the apportionment of the blame and of the economic obligation:

> "It has often been said that a person born out of wedlock, the parents of that person (the mother much more so than the father), and sometimes the entire family of the mother, suffer a stigma as the result of the nature of the birth .... [I]t impairs the social position, not only of the person born out of wedlock, but also the mother, thus constituting for her an obstacle to the realization of a normal life in the community in which she lives." Secretary of the United Nations, *Report:*

[34]See *Weber v. Aetna Casualty Company*, 406 U.S. 164, 172 (1972); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968), discussing the protection of the mother-illegitimate child relationship.

> "The Status of the Unmarried Mother: Law and Practice" 56 (1971).[35]

Thus the statute directly interferes with family relationships. Since it does not bear any rational, fair or substantial relationship to any legitimate state interest, it is completely arbitrary in creating a preference in favor of surviving fathers and against surviving mothers.

CONCLUSION

For the reasons stated, appellants respectfully request that this Court reverse the judgment of the Illinois Supreme Court, and find that: (1) The Illinois Probate Act invidiously discriminates against and among illegitimate children, thereby denying them Equal protection of the Laws as guaranteed by the Fourteenth

[35]Historically mothers of illegitimate children have borne a greatly disproportionate share, compared to the fathers, of the stigma, condemnation, and punishment, as well as of the obligation to support and nurture the child. See also Vincent, "Teenage Unwed Mothers in American Society," XXII, No. 2 The Journal of Social Issues 22, 30-31 (April 1966); Krause, "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 477 (1967).

Amendment, and (2) the Illinois Probate Act invidiously discriminates against appellants on the basis of sex in violation of the Fourteenth Amendment.

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APPENDIX A

I. STATES WHICH HAVE THE SAME PROVISION AS ILLINOIS: INHERITANCE FROM FATHER ONLY BY LEGITIMATION.

1. Ala. Code, tit. 16, § 7; tit. 27, § 10 (1958)
2. Ark. Stat. Ann. § 61-141 (1971)
3. D.C. Code Ann. § 19-316 (1973)[1]
4. Ga. Code Ann. § 113-904 (1975); § 74-101, § 74-201 (1973)[2]
5. Hawaii Rev. Stat. § 532-6 (1968)[3]
6. Ky. Rev. Stat. § 391.090 (1972)
7. Mass. Gen. Laws Ann. ch. 190, § 5; ch. 190, § 7 (1969)
8. Miss. Code Ann. § 91-1-15 (1973)[4]
9. Mo. Ann. Stat. § 474.060, § 474.070 (Vernon 1956)
10. N.H. Rev. Stat. Ann. § 561:4 (Supp. 1973)
11. N.J. Stat. Ann. § 3A:4-7 (1953)
12. Pa. Stat. Ann. tit. 20, § 2107 (1975)

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[1] D.C. Code Ann. § 16-2353 (1973) provides for legitimation by intermarriage of parents and acknowlegement by father or by a paternity adjudication.

[2] Ga. Code Ann. § 74-103 (1973), provides for legitimation by petition of father and court order; § 74-201 (1973) defines an illegitimate child as one whose parents do not subsequently intermarry.

[3] Hawaii Rev. Stat. § 338-21 (Supp. 1975) provides three methods of legitimation: (1) by intermarriage of parents; (2) by written acknowledgement of mother and father; or (3) by a paternity adjudication.

[4] Miss. Code Ann. § 91-1-15 (1973) gives the illegitimate child inheritance rights from the father upon intermarriage of the parents and the father's acknowledgement.

13. R.I. Gen. Laws Ann. § 33-1-8 (1970)
14. S.C. Code Ann. § 19-53, § 20-5.1 (1962)
15. Tenn. Code Ann. § 31-107, § 31-205 (1955)
16. Tex. Prob. Code § 42 (1956)
17. Va. Code Ann. § 64.1-5, § 64.1-6 (1973)
18. W.Va. Code Ann. § 42-1-5, § 42-1-6 (1966)
19. Wyo. Stat. Ann. § 2-44 (1959)
20. By judicial construction, Connecticut limits the inheritance rights of the illegitimate child to the maternal line. E.g. *Moore v. Saxton*, 90 Conn.164, 96 A.960 (1916); *Eaton v. Eaton*, 88 Conn.269, 91 A.191 (1914); *Appeal of Atkinson*, 42 Conn.491 (1875); *Inhabitants of Town of Woodstock v. Hooker*, 6 Conn.35 (1825).

II. STATES WHICH HAVE ADOPTED THE UNIFORM PROBATE ACT, WHICH ALLOWS ILLEGITIMATE CHILDREN INTESTATE SUCCESSION RIGHTS FROM AND THROUGH THE FATHER IF: 1) THEY HAVE BEEN LEGITIMATED; OR 2) THERE HAS BEEN AN ADJUDICATION OF PATERNITY PRIOR TO THE FATHER'S DEATH; OR 3) THEY CAN ESTABLISH PATERNITY BY "CLEAR AND CONVINCING EVIDENCE" AFTER THE FATHER'S DEATH.

1. Alaska Stat. § 13.11.045 (1972)
2. Ariz. Rev. Stat. Ann. § 14-2109(2) (1975)
3. Colo. Rev. Stat. Ann. § 15-11-109(b) (1973)
4. Del. Code Ann. tit. 12, § 508 (Supp. 1975)
5. Fla. Stat. Ann. § 732.108(2) (Supp. 1975)
6. Idaho Code § 15-2-109 (Supp. 1975)
7. Mont. Rev. Codes Ann. § 91A-2-109(2) (1975)

8. N.D. Cent. Code § 30.1-04-09(2) (Supp. 1975)
9. S.D. Compiled Laws Ann. § 29A-2-109 (1975)
10. Utah Code Ann. § 74-4-10 (1953); § 75-2-109 (1975)

III. STATES GRANTING SUCCESSION RIGHTS FROM FATHER IF PARENTS INTERMARRY OR IF THERE HAS BEEN AN ORDER OF FILIATION OR PATERNITY ADJUDICATION.

1. Ind. Code § 29-1-2-7 (Burns 1972)
2. N.Y. Est., Powers & Trusts § 4-1.2 (McKinney 1967)

IV. STATES GIVING ILLEGITIMATE CHILD SUCCESSION RIGHTS FROM FATHER IF PARENTS INTERMARRY, OR IF THE FATHER ACKNOWLEDGES THE CHILD, OR IF THERE'S BEEN A PATERNITY ADJUDICATION.

1. Cal. Prob. Code § 255 (Supp. 1975); Cal. Civ. Code § 7000 *et seq.* (Supp. 1975)
2. Kan. Stat. Ann. § 59-501 (1964)
3. Md. Est. & Trusts Code Ann. § 1-208 (1974)
4. N.M. Stat. Ann. § 29-1-18, § 29-1-20 (Supp. 1975)
5. N.C. Gen. Stat. § 29-18, § 29-19; § 49-10, § 49-12 (Supp. 1974)

6. Ore. Rev. Stat. § 109.060, § 109.070, § 112.105 (1975)[5]
7. Vt. Stat. Ann. tit. 14, § 553, § 554 (1974)
8. Wis. Stat. Ann. § 852.05 (1971)

V. STATES GRANTING SUCCESSION RIGHTS FROM FATHER IF CHILD IS LEGITIMATED, OR IF FATHER ACKNOWLEDGES CHILD.

1. Iowa Code § 633.221; § 633.222 (1971)
2. Me. Rev. Stat. Ann. tit. 18, § 1003 (1964)
3. Mich. Comp. Laws § 702.81, § 702.83 (1973)[5]
4. Minn. Stat. § 525-172 (1975)
5. Neb. Rev. Stat. § 30-109 (1964)[6]
6. Nev. Rev. Stat. § 134.170 (1973)
7. Ohio Rev. Code Ann. § 2105.17, § 2105.18 (Baldwin Supp. 1975)
8. Okla. Stat. tit. 84, § 215 (1970)[6]
9. Wash. Rev. Code § 11.04.081 (1967)

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[5] Ore. Rev. Stat. § 109.070(5) (1975) and Mich. Comp. Laws § 702.83 (1973) require acknowledgement by both parents of the putative father's paternity.

[6] Neb. Rev. Stat. § 30-109 (1964) and Okla. Stat. tit. 84, § 215 (1970) provide that an acknowledgement by the father establishes the child cannot represent either father or mother in the collateral or lineal kindred's estate unless the parents intermarry.